Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

80-810

NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HECTOR GARCIA,

Petitioner,

v.

ALTON V. M. GLOOR, W. H. HAUBOLDT, JR., WILBURN F. GLOOR and GLOOR LUMBER & SUPPLY, INC.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES A. HERRMANN
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(512) 423-3111
November 18, 1980

Attorneys for Petitioner

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Hearings before the U.S. Comm. on Civil Rights, San Antonio, Texas (1968). 8

The Mexican-American People: The Nations Largest Minority, Grebler (Free Press, New York, 1970). 9

National Center for Ed. Stats., U. S. Dept. H.E.W. Bull., Georgraphic Distribution Nativity and Age Distribution of Language Minorities in the United States: Spring 1976. 7

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The Petitioner, Hector Garcia, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 22, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Whether language is a protected characteristic of national origin under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq.

2. Whether language use restrictions applied to national origin language minorities constitute per se adverse impact under Title VII which must be justified by a business necessity.

3. Whether prohibitive language rules which have a demonstrated adverse impact require a shift in the burden of proof.

OPINION BELOW

The opinion of the Court of Appeals for which a writ is sought is found at 618 F.2d 264 (5th Cir. 1980) attached hereto as Appendix D. The first opinion of the circuit panel which was withdrawn can be found at 609 F.2d 156 (5th Cir. 1980) which is attached as Appendix C. The Findings of Fact and Conclusions of Law of the District

Court are attached as Appendix B and the finding of probable cause for discrimination by the EEOC is attached as Appendix A. Proposed Guidelines of the Equal Employment Opportunity Commission are attached as Appendix E.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 4, 1980. A timely Petition for Rehearing was granted on May 22, 1980 and a timely Petition for Rehearing En Banc was denied on August 20, 1980 and this Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

Title VII, Civil Rights Act of 1964, §703(a), 42 U.S.C. §2000e-2(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF CASE

Plaintiff, a Mexican-American born in Brownsville, Texas whose dominant language is Spanish, was discharged from his employment for speaking Spanish to another Mexican-American employee in violation of the employer's "English only" rule. The employer's rule states:

> ALL PERSONNEL
>
> "Some time ago a letter was circulated concerning employees speaking Spanish instead of English between themselves here at work. It has become necessary to again remind you to speak English. This may be a hard habit to break, but it must be done.
>
> SPEAKING SPANISH
>
> The company realizes you have to speak Spanish to some of our customers. Personnel will not speak Spanish between themselves. The only exception would be that one individual is asking about

a transaction concerning a Spanish speaking customer and the customer is standing there, then the transaction can be in Spanish. If one of the salesmen or yard men are waiting on an individual that speaks only English and should be approached by Spanish speaking customers, he should excuse himself prior to answering in Spanish."

BY: Wilburn F. Gloor
Assistant Manager

ALL PERSONNEL

"Some time ago a letter was circulated concerning employees speaking Spanish instead of English between themselves here at work.

It has become necessary to put out another reminder as the situation has gotten out of hand. This may be a hard habit to break, but it must be done.

We realize you have to speak Spanish to some of our customers and a few yard employees do not speak English. The people that we are talking about are office and permanent yard personnel."

By W.H. Hauboldt, Jr.
Vice President

At the time of trial, Plaintiff was 24 years of age and spoke Spanish in his own household. Two of his grandparents were born in Mexico. Because his parents spoke only Spanish, the Plaintiff did not learn

English until he started grade school in Brownsville.

Gloor Lumber and Supply, Inc. is a corporation doing retail business in Brownsville, Texas. The population of Brownsville is approximately 85% Mexican and Mexican-American, reflecting the composition of the Defendant's clientele and work force. Thirty-one of thirty-nine of the Defendant's employees are Mexican-Americans. All of the Mexican-American, but none of the Anglo-American employees, speak Spanish.

Hector Garcia was employed as a retail salesperson by the Defendants in their hardware store from September, 1973 until his discharge on June 10, 1975. His duties included stocking his department, keeping it in order, assisting other department sales persons, and selling hardware and building supplies.

On June 10, 1975, Hector Garcia was overheard by Alton V. W. Gloor responding in Spanish to a question which had been asked of him, in Spanish, by a fellow Mexican-American employee. Hector Garcia was terminated on the spot by Alton Gloor for violation of the speak "English only" rule. A charge of discrimination was filed with the Equal Employment Opportunity

Commission alleging that the "English only" rule was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. The EEOC found probable cause for discrimination on December 2, 1975 (Appendix A). A suit was filed in the United States District Court for the Southern District of Texas under the Equal Employment Opportunity Act and the Civil Rights Acts, 42 U.S.C. §§1981 and 1985(3). Jurisdiction was invoked under 28 U.S.C. §1343 and 42 U.S.C. §2000e-5(f). Final judgment was entered on January 27, 1977, dismissing the Plaintiff's case (Findings of Fact and Conclusions of Law attached as Appendix B). The judgment was appealed and affirmed by the United States Court of Appeals for the Fifth Circuit. Hector Garcia v. Alton V. W. Gloor, 609 F.2d 156 (5th Cir. 1980) (Appendix C). The Fifth Circuit withdrew its first opinion and substituted another opinion, 618 F.2d 264 (5th Cir. 1980)(Appendix D).

REASONS FOR GRANTING THE WRIT

1. This Petition presents an issue of significant public importance to millions of language minority persons whose dominant language is Spanish. The treatment of national origin language minorities has

been a question of national concern.[1]

The Petitioner, Hector Garcia, is Spanish dominant by birth, culture and social setting. His language is a characteristic with which Title VII is concerned. In McDonnell Douglas v. Green, 411 U.S. 792 (1973), this Court stated that:

> Griggs was rightly concerned that childhood deficiencies in the education and background of minority citizens resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives. Green, supra. at 806.

There are 10.6 million ethnic Hispanics with Spanish language backgrounds in the United States. U. S. Bureau of Census: 1970 Detailed Characteristics Final Report PC (1) D-4, D-7, D-33, D-45; National Center for Ed. Stats., U. S. Dept. of H.E.W.

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1 Congress and the courts have sought to rectify the problems caused by language differences. Bi-lingual Education Act, Title VII Elementary and Secondary Education Act, 20 U.S.C. §880(b) et. seq. (Supp. IV 1974); Voting Rights Act of 1975, 42 U.S.C. §1973 aa-1(a)-(e) (1975); Lau v. Nichols, 414 U.S. 563 (1974); Katzenbach v. Morgan, 384 U.S. 641 (1966); Hernandez v. Texas, 374 U.S. 475 (1954).

Bulletin, Geographic Distribution, Nativity, and Age Distribution of Language Minorities in the United States: Spring 1976 (8/22/78). Language may be the most important single element of ethnic or social identification for linguistic minorities such as Mexican-Americans. Language is the main characteristic by which Mexican-Americans in the Southwest distinguish themselves.

Supression of the Spanish language in the Southwest has been identified as a prime source of discrimination and tension. Hearings before the United States Commission on Civil Rights, San Antonio, Texas, December 9-14 (1968) pps. 126, 147, 153-158, 163-176, 600, 881-882, (U. S. Gov. Printing Office, 1969). Finally, the failure of society and government to recognize the Spanish language as the most salient characteristic of Mexican-Americans has contributed to economic deprivation for Mexican-Americans. The Chicano Worker, 19-25 (University of Texas Press 1977); Postan and Alvires, On The Cost of Being a Mexican-American, 53 Social Science Quarterly, 697 (March, 1973).

The decision below will determine the extent to which other important characteristics of Mexican-Americans and other

national origin groups will be scrutinized. The decision may also adversely affect the ability of over 28 million persons in the United States whose primary language is not English to obtain educational, social, and housing rights and protections.

The Petition presents an issue of exceptional, continuing public importance. The involvement of the various amici in the Courts below including, the Mexican-American Legal Defense and Education Fund, League of United Latin American Citizens, Equal Employment Opportunity Commission and the Lumbermen's Association of Texas, indicate the broad public interest in this case.

2. It is essential that this Court positively settle the status of language as a national origin characteristic.

Language is an essential characteristic of national origin. Language, as a dominant characteristic of Mexican-Americans, has been recognized and is supported by numerous authorities. See, The Mexican-American People; The Nation's Largest Minority, Grebler, Moore, Guzman, (Free Press, New York 1970), p. 439; El Lenguaje De Los Chicanos: Regional And Social Characteristics of Language Used By Mexican-Americans, Hernandez, Cohen, Beltramo, Center for Applied Linguistics, 1975.

The primary language of an individual used since birth, correlates closely, if not absolutely, with his ancestry as the Court noted in Lau v. Nichols, 414 U. S. 563 (1974). Failure to recognize and treat fairly language differences is unacceptable in the context of public education. Lau, supra. Language differences have been recognized as protected characteristics under Constitutional analysis.

> "The protection of the Constitution extends to all those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution - a desireable end cannot be prompted by prohibited means." Meyer v. Nebraska, 262 U.S. 399 (1923) at 401.

See also, Castaneda v. Partida, 430 U. S. 482 at 485 ft. nt. 5 (1977); Philip Ortega, Some Cultural Implications of a Mexican American Dialect of American English, Studies in Linguistics, Vol. 21, 1969-70 p. 77.

A definition of national origin to include language characteristics is necessary to effectuate the remedial purposes of Title VII. Senator Williams, the principal author of the 1972 amendments to Title VII,

defined Hispanic Americans as Spanish speaking and stated that they needed the protection of Title VII because of their cultural and linguistic isolation:

> Those who have come from the South from Spanish-speaking lands, also came here for opportunity. From depressed lands, they came to get jobs. Their assimilation has yet to be completed. The other [immigrants] I have mentioned have been assimilated quite fully, notwithstanding that they came to a land where they were not in a majority in terms of religion or national origin; but those from the South, who came with another language, the Spanish-speaking people who came here, have yet to be assimilated. 118 Congressional Record, 4909 (1972).

The assertion of the Court of Appeals that "neither the statute nor common understanding equate national origin with language" is demonstrably false and inconsistent with precedent and Congressional intent. Garcia, 618 F.2d at 268.

3. The decision below conflicts with decisions of this Court interpreting Title VII and raises important questions of statutory construction.

This is a case of first impression involving prohibatory language rules as national origin discrimination under Title VII. The Petitioner raises the issue of whether a work rule prohibiting the speak-

ing of Spanish constitutes discrimination on the basis of national origin when applied to a Mexican-American employee who speaks English as a second language and who was discharged after he spoke a few words of Spanish to a Mexican-American co-worker. Title VII, §703(a)(1)(2) is the statutory basis for the Supreme Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971) which held that Title VII proscribes practices which are fair in form but discriminatory in operation. Nashville Gas Company v. Satty, 434 U.S. 136, 140-141 (1977).

In Griggs, it was established that where a condition of employment adversely impacts on a protected class, the employer must show that the practice is justified by business necessity. Intent on the part of the employer or the employee is irrelevant.

Title VII and Griggs are concerned with neutral criteria which have an adverse impact. Griggs, supra. at 429. A high school diploma is no less of a choice than language useage but the question to be answered is not that of choice but of impact on a protected group. The Court below ruled that as a matter of law there is no discriminatory effect arising from the discharge of a language minority who

does not speak English when capable of doing so, i.e., if it is possible for a language minority to speak English then the use of his native language can be penalized without reason by the employer. In addition, the Court below required the Petitioner to justify his violation of the employer's "English only" rule before the employer was required to assume his burden of proof under Griggs. By so doing the decision interjected an evidentiary burden which is not proper and which is a significant departure from the standards established by this Court in Griggs and Furnco Construction Corporation v. Waters, 438 U.S. 567, 574-575 (1978).

The Fifth Circuit substituted its own ideas about the significance of language as a national origin characteristic rather than apply the appropriate legal test under Griggs. This Court has admonished lower courts to choose the appropriate standard for analysis and follow through with it. Furnco, supra. at 574-575. The problem addressed by the Court in Furnco was:

> Whether the Court of Appeals had gone too far in substituting its own judgment as to proper hiring practices in the case of an employer which claimed the practices it had chosen did not violate Title VII.

The error of the Court of Appeals in this case is similar to the error of the Court of Appeals in Furnco. In Furnco the Court of Appeals based its decision on its assumption of discriminatory impact before requiring the parties to complete the proper order of proof, ignoring standards of Griggs and McDonnell-Douglas. Here, the Court below imposed a new burden on the Plaintiff to prove that he had a legal right to exercise what the Court deemed a "mere preference for his native language" regardless of the impact of the rule on national origin and the absence of a showing of business necessity. By substituting its own opinion of language as a national origin characteristic and by changing the burden and order of proof, the Court below precluded any chance that the Plaintiff could establish a prima facie case under Griggs and obviated the necessity of the employer having to prove a business justification for its rule.

The decision below departs radically from Griggs in two important respects. 1) The Court below would require that before a prima facie case of adverse impact can be made, the employee must show that the rule is one that he or she cannot somehow avoid

regardless of its discriminatory implications. Any language minority who can speak some English will have to walk the linguistic tightrope on pain of discharge. 2) The decision also appears to require the employee to find some intent, motive or purpose on the part of the employer to discriminate. This requirement is foursquare counter to the principles of Griggs. The ability of other minorities to prove their claims of employment discrimination may also be adversely affected because the decision substantially changes the burden of proof in an impact case.

This case is somewhat unique in that the condition of employment about which the Petitioner complains is directly related to a national origin characteristic, i.e., language. The employer's acts or rule giving rise to the claim of discrimination is closely tied to national origin status itself. The burden must not be shifted to the employee to justify his own national origin characteristics but must remain with employer to justify his actions. The Griggs plaintiffs did not have to excuse the fact that they had not acquired a high school diploma. A high school diploma is logically more attenuated from race than language from national origin.

Just as in a case of retaliation under §704 of the Act, an employer should not be allowed to use an employee's complaints or legitimate actions in response to an employer's discriminatory conduct as an excuse for retaliation against the employee. There are limits to the extent to which an employer may rebutt or defend a claim of discrimination, i.e , there are some defenses and rebuttal arguments that may be impermissible as a matter of law. The Plaintiff's conduct in the instant case certainly does not rise to the level of felony theft described in McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976) or the public disorder described in McDonnell-Douglas v. Green. Even Defendant Alton Gloor testified that he did not think that the Plaintiff was intentionally violating the "English only" rule on the occasion giving rise to the Plaintiff's discharge. In both Santa Fe Trail and McDonnell-Douglas, the employer was required to justify its reliance on the alleged misconduct of the employee as a rebuttal to a prima facie case of discrimination.

The EEOC has reviewed other cases of language discrimination and has uniformly

ruled that prohibitions on language use by national origin persons are prohibited. EEOC Decision Number 71-446, Nov. 5, 1970; EEOC Decision Number 72-0281, August 9, 1971. Prior to the events which gave rise to Plaintiff's complaint, the EEOC had promulgated a general policy guideline on language rules. 29 C.F.R. §1606.1(1). The Court below would have required a formal regulation and gave no deference to the guidelines or EEOC decisions contrary to the admonitions of this Court. Griggs, supra. at 433-34.

The EEOC has presently promulgated proposed revisions of its guidelines on discrimination because of national origin. 45 Fed. Reg. No. 184, p. 62728, Friday, September 19, 1980 (Appendix E) These guidelines have been published partly in response to the Fifth Circuit decision in Garcia v. Gloor.

There are presently three reported cases involving language discrimination. Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980); Berke v. Ohio Department of Public Welfare, 24 E.P.D. ¶31,217 (6th Cir. 9/4/1980); and, Saucedo v. Brothers Well Service, 464 F.Supp. 919 (S.D. Tex. 1979). In the Berke case, the Sixth Circuit applied

a McDonnell-Douglas disparate treatment analysis and upheld a finding of discrimination against a language minority. There is an unreported decision from the Western District of Texas in which a holding was arrived at through yet another route. Resendez v. State National Bank, No. EP-78-CA-60 (Judgment 11/28/78) (bank teller). There are presently three known cases pending in the Southern and Western Districts of Texas. Hernandez v. Providence Memorial Hospital, EP-78-CA-179 (W.D. Tex. El Paso Div. 1978)(nurse's aid - case submitted); Baldomero Casas v. Britton's Photo Supply Company, B-78-202 (S. D. Tex. 1978)(retail salesman and delivery person - case submitted on motion for summary judgment); Natividad Vasquez v. McAllen Bag and Paper, B-78-135 (S.D. Tex. 1978) (truck driver - case submitted . In addition, pending the decision of the Fifth Circuit on Plaintiff's Petition for Rehearing En Banc, counsel for the Petitioner and amicus were apprised of three instances in which the opinion below was used as an excuse for promulgating discriminatory language rules in such far away places as Anchorage, Alaska and San Francisco, California. Every new decision adds to the confusion.

Given the restrictive decision of the Court below and the generally broad language of the proposed EEOC Guidelines, this Court should move to resolve the inconsistencies and doubt in the area before further time and resources are expended.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

TEXAS RURAL LEGAL AID, INC.
305 E. Jackson, Suite 206
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(512) 423-3111

BY: James A. Herrmann
JAMES A. HERRMANN
Attorney for Petitioner

November 18, 1980

APPENDIX

APPENDIX A

Control No. TSA6 0096-8
Date Filed: July 18, 1975
Date Served: September 26, 1975

Mr. Hector Garcia
134 E. 10th Street, Apt. 2
Brownsville, Texas 78520 Charging Party
Certified No. 396643

Gloor Lumber & Supply, Inc.
1900 Price Road
Brownsville, Texas 78520 Respondent
Certified No. 396642

DETERMINATION

Under the authority vested in me by Section 1601.19B of the Commission's Procedural Rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission, the following determination as to the merits of the subject charged.

The timeliness and all other requirements have been met; the Respondent is an employer within the meaning of Title VII.

The Charging Party alleges that the Respondent violated Title VII by discharging him because of a discriminatory language policy, failing to promote, and condoning degrading working conditions to Mexican-American employees because of their national origin, Spanish Surnamed Americans. The record evidence supports the discharge allegation only.

The Respondent was served with a copy of the charge of discrimination on the instant charge during a personal conference with the Respondent's attorney and other Respondent officials on September 26, 1975. On this date, the Respondent was asked to submit certain investigative documents with which the Respondent failed to comply fully. Further, the Respondent was given the opportunity to submit a written Statement of Position regarding the allegations. Respondent failed to do so.

Record evidence demonstrated that the Respondent enforces an employee policy/rule which reads as follows:

RULE

SPEAKING SPANISH: "The company realizes you have to speak Spanish to some of our customers. Personnel will not speak Spanish between themselves. The only exception would be that one individual is asking about a transaction concerning a Spanish speaking customer and the customer is standing there, then the transacton should be in Spanish. If one of the salesmen or yardmen are waiting on an individual that speaks only English, and should he be approached by a Spanish speaking customer, he should excuse himself prior to answering in Spanish."

Further, the record evidence demonstrated that the Charging Party was employed on September 27, 1973 through June 10, 1975 at which time he was discharged. The Charging Party received periodic merit wage increases during this employment period, and a $200.00 cash "Bonus" on or about June 1, 1975, for which the Respondent's President explained the "Bonus" plan as one given to employees with one or more years of satisfactory work performance. No documented evidence was found or produced by the Respondent that

indicated that Charging Party's work performance was not satisfactory. The record evidence further demonstrated that the Charging Party's claim for unemployment benefits through the Texas Employment Comission was sustained in favor of the Charging Party after the first and final Appeals Hearing. It indicates that Charging Party's discharge "was not of such nature or reoccurence as to constitute misconduct connected with the work".

This Commission has held that the enforcement of a rule that prohibits or restricts the use of the Spanish language during working hours which has a direct affect on Spanish speaking employees has the unlawful effect of discriminating on the basis of national origin by denying to such employees as a class, a condition, or privilege of employment enjoyed by other employees. The use of a policy which in fact, discriminates between classes because of ethnic grouping is prohibited by Title VII. Here, the Respondent has denied the Spanish Surnamed American employees the opportunity to converse in their native language with which they are most familiar and has failed to show a business need for the policy/rule.

There is reasonable cause to believe that Respondent committed an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended, by promulgating a policy/rule restricting Respondent's Spanish Surnamed American employees from speaking and conversing in Spanish without prejudice to their work performance and for which Charging Party was discriminatorily discharged.

With reference to the promotion of Spanish Surnamed American's to Management Positions, and degrading working conditions allegations, there was no evidence discovered which supports these allegations.

Having examined the entire record, I conclude that there is reasonable cause to believe that Title VII of the Civil Rights Act of 1964, as amended, has been violated in the following manner: The Charging Party was discharged because of a discriminatory language policy. However, there is not reasonable cause to believe that Title VII has been violated regarding: The promotion and working conditions allegation.
Having determined that there is reasonable cause to believe that the law has been

violated, I now invite the parties to join with the Commission in a collective effort toward joint resolution of the matter and to eliminate unlawful employment practices. An information sheet title "Notice of Conciliation Process" is attached to this letter of determination for the information of all parties. A representative of the Commission will contact each party in the near future to begin the conciliation process; until then, no action is required of any party.

On behalf of the Commission:

ALVARO GARZA
District Director

Date: December 2, 1975

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

HECTOR GARCIA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED	§	
VS	§	CIVIL ACTION NO. 75-B-130
ALTON V. W. GLOOR, ET AL.	§	

FINDINGS OF FACT

1. Hector Garcia was an employee of Gloor Lumber and Supply Co., Inc. from September, 1973 until the date of his firing June 10, 1975.

2. Gloor Lumber and Supply Co., Inc., a Brownsville, Texas corporation, is in the business of selling hardware and building materials, land development and building construction.

3. In 1975 Gloor Lumber and Supply had thirty-nine employees, thirty-one of whom were Spanish surnamed Mexican-Americans.

4. Gloor Lumber and Supply had a language policy which permitted Spanish to be spoken while waiting on a Spanish speaking

customer, but otherwise, English was to be spoken. However, this policy, was only limited to sales personnel and was only in effect during working hours.

5. This requirement was made a policy for valid business reasons, namely, to improve customer relations, to aid an employee in improving his English so that he would be a more valuable member of the business community, and to improve inter-office relationships, and was not made to discriminate against their employees.

6. Hector Garcia was fired for failure to update his inventory, for failing to replenish merchandise with inventory on hand, for failing to keep area clean, for failing to respond to numerous reprimands, and for failing to follow the language policy.

7. The language policy was not strictly enforced since Hector Garcia had violated the language policy at every opportunity since the time of his hiring according to his own testimony.

8. Hector Garcia was not discriminated against due to the language policy of the defendant.

9. The firing of Hector Garcia was on an individual basis and not because he was a member of a class.

10. There is no reason to certify this case as a class action as the Court finds the language policy as enforced non-discriminatory.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 42 U. S. C. §2000e-2.

2. Gloor Lumber and Supply Company's firing of Hector Garcia was neither a violation of 42 U. S. C. §2000e-2 nor a violation of 42 U. S. C. §§1981 and 1985 (3).

3. The language policy is a bona fide occupational qualification.

4. Hector Garcia is not entitled:

(1) to any back pay award for damages,

(2) to any injunctive relief,

(3) to any attorneys fees.

5. All Findings of Fact which are more properly characterized as Conclusions of Law are hereby adopted as such. All Conclusions of Law which are more properly characterized as Findings of Fact are hereby adopted as such.

6. Defendant's counsel shall submit a proposed form of judgment consistent with the foregoing, after approval as to form by plaintiff's counsel.

Signed at Laredo Texas, this 7th day of December, 1976.

ROBERT O'CONOR, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX C

HECTOR GARCIA, etc.,
Plaintiff-Appellant,

v.

ALTON V. W. GLOOR, et al.,
Defendants-Appellees.

NO. 77-2358

United States Court of Appeals
Fifth Circuit

January 4, 1980

609 F.2d 156

Appeal from the United States District Court for the Southern District of Texas.

Before FAY, RUBIN and HATCHETT, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Invoking Title VII, the Equal Employment Opportunity Act, 42 U. S. C. §2000e§2 (EEO Act), Hector Garcia, a native-born American of Mexican descent, challenges as discriminatory his employer's rule that prohibits employees engaged in sales work from speaking Spanish on the job. We find that the "speak-only-English" rule, as it

was applied by Mr. Garcia's employer, does not discriminate on the basis of national origin. We therefore affirm the district court's judgment that Mr. Garcia's discharge for violating the rule was not unlawful, and, because the group of employees Mr. Garcia sought to represent was not numerous enough to constitute a class, we also affirm its denial of class action certification.

I.

Hector Garcia, who was twenty-four years of age at the time of trial, completed the first semester of the tenth grade in Texas public schools. He speaks both English and Spanish. His grandparents were immigrants from Mexico; he is native-born, but he has always spoken Spanish in his own household.

In 1975, he was employed as a salesman by Gloor Lumber and Supply, Inc., in Brownsville, Texas. His duties included stocking his department and keeping it in order, assisting other department salespersons and selling lumber, hardware and supplies. He had received compliments from management on his work and in May 1975 had received a bonus of $250. However, there also was evidence that Mr. Garcia was not a satis-

factory employee, that management's compliments were bestowed as incentives to better performance when, on occasion, his work showed some improvement and that a bonus was awarded to all employees at year-end without regard to merit.

Gloor had a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish speaking customers. The rule did not apply to conversation during work breaks or to employees who worked outside in the lumber yard.

Mr. Garcia testified that, because Spanish is his primary language, he found the English-only rule difficult to follow. He testified that on June 10, 1975 he was asked a question by another Mexican-American employee about an item requested by a customer and he responded in Spanish that the article was not available. Alton Gloor, an officer and stockholder of Gloor, overheard the conversation. Thereafter Mr. Garcia was discharged.

Mr. Gloor testified, and the district court found as a fact, that Mr. Garcia's discharge was for a combination of deficiencies-failure to keep his inventory current, failure to replenish the stock on

display from stored merchandise, failure to keep his area clean and failure to respond to numerous reprimands-as well as for violation of the English-only rule. The court also found that the English-only policy was not strictly enforced but that Mr. Garcia had violated it "at every opportunity since the time of his hiring according to his own testimony."

In addition to offering this evidence to justify firing Mr. Garcia, Mr. Gloor testified that there were business reasons for the language policy: English-speaking customers objected to communications between employees that they could not understand; pamphlets and trade literature were in English and were not available in Spanish, so it was important for employees to be fluent in English apart from conversations with English-speaking customers; if employees who normally spoke Spanish off the job were required to speak English on the job at all times and not only when waiting on English speaking customers, they would improve their English: and the rule would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates. The district court found that these were valid business reasons and that they, rather than discrimination, were

the motive for the rule.

An expert witness called by the plaintiff testified that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others. Consequently, Mr. Garcia contends, with support from the Equal Employment Opportunity Commission (EEOC), that the rule violates the EEO Act and the Civil Rights Acts, 42 U. S. C. §§ 1981 and 1985(c).

Of the eight salesmen employed by Gloor in 1975, seven were Hispanic, a matter perhaps of business necessity for 75% of the population in that area is of Hispanic background, and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish. Of its 39 employees, 31 were Hispanic, and a Hispanic sat on the Board of Directors. There is, therefore, no contention that Gloor discriminated against Hispanic-Americans in any other way.

The narrow issue is whether the English-only rule imposes a discriminatory condition of employment on Hispanic-Americans.

II.

[1,2] Mr. Garcia properly complains that the court arrived at its denial of

class certification by deciding that he had no case on the merits. The question of class certification is a procedural one, distinct from the merits of the action. Huff v. N. D. Cass Co., 5 Cir. 1973, (en banc), 485 F.2d 710; Miller v. Mackey International, Inc., 5 Cir. 1971, 452 F.2d 424, 428-28. See also Satterwhite v. City of Greenville, 5 Cir. 1978, (en banc), 578 F.2d 987, 993-94. Whether a class should be certified depends entirely on whether the proposal satisfies the requirements of Fed.R.Civ.P. 23. See generally 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 1759-1770 (1972).

[3] Although the reason given by the trial judge for denying class certification was wrong, the result reached was correct. A prerequisite for a class action is that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23 (a)(1). "The raison d'etre of the class suit doctrine is necessity, which in turn depends upon the question of number." 3B Moore's Federal Practice ¶23.05, at 23-149 (2d ed. 1979). This depends on the facts of each case and no arbitrary rules have been established, 7 C. Wright and A. Miller, Federal Practice and Procedure: Civil,

§1762 (1972), nor indeed should be. The basic question is practicability of joinder not number of interested persons per se. Practicability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion. See id.; 3B Moore's Federal Practice ¶23.05 (2d ed. 1979).

[4] Only twenty-one persons, those Gloor employees who worked in the sales area, could possibly have been affected by the English-only rule. Their identity and addresses were readily ascertainable, and they all lived in a compact geographical area. The suggested class therefore failed to meet the elementary requirement that supports the whole theory of class action-representation by one person of a group so numerous that joinder in one suit would be impracticable.

III.

Although the trial judge concluded that Mr. Garcia was fired for a number of reasons, including speaking Spanish on the job, the judge made no finding concerning the substantiality of the language violation in contributing to the matrix of

motive. Perhaps under the evidence he could not, once the omelet had been cooked, determined what each egg had contributed to it.

[5] Employer action does not violate Title VII merely because a reprobated reason plays some part in the employer's decision, see Rogers v Equal Employment Opportunity Commission, D. C. Cir. 1977, 179 U. S. App.D.C. 170, 551 F.2d 456; yet the forbidden taint need not be the sole basis for the action in order to condemn it. The record would support a finding that Mr. Garcia's use of Spanish was a significant factor and, therefore, rather than remand for a determination by the trial court, we will assume for present purposes that it was. We turn then to the issues that appear to both parties and the several amici to be at the core of the case.

[6] In an employee suit for discharge alleged to be EEO-wrongful, the burden is on the employee to establish a prima facie case of discrimination. See McDonnell Douglas Corp. v Green, 1973, 411 U. S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed. 2d 668, 677. If the English-only rule is not discriminatory, Mr. Garcia's suit fails; if

it is shown on its face to be reprobated, then we should next consider whether Gloor has a legal defense justifying the rule.

The EEO Act sought to assure equality of employment opportunity by making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a)(1).

[7] In interpreting the statute[1] we start with its plain words without pausing to consider whether a statute differently

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1 While the EEOC has considered in specific instances whether a policy prohibiting the speaking of Spanish in normal interoffice contacts discriminates on the basis of national origin, [1972] Empl.Prac.Guide (CCH) ¶6293; [1972] Empl.Prac.Guide (CCH) ¶6173, it has adopted neither a regulation stating a standard for testing such language rules nor any general policy presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.

framed would yield results more consonant with fairness and reason. See B. Cardozo, The Nature of the Judicial Process 88-89 (1921). The first consideration is the problem, not the answer. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L. Rev. 527, 529-30 (1947). The statute forbids discrimination in conditions of employment based on national origin. Neither the statute nor common understanding equates national origin with the language that one chooses to speak.[2] Moreover, Mr. Garcia's national origin is not Mexican; he is a citizen of the United States by birth.

Mr. Garcia and the EEOC both contend that the English-only rule is discriminatory under the statute and that it is not justified by business necessity. We consider each argument separately.

The contention that it is discriminatory to prohibit speaking a foreign language on the job turns on the thesis

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2 The statute's legislative history concerning the meaning of "national origin" is "quite meager." See Espinoza v. Farah Mfg. Co., 1973, 414 U.S. 86, 88, 94 S.Ct. 334, 337, 38 L.Ed.2d 287, 291.

that, if an employee whose most familiar language is not English is denied the right to converse in that language, he is denied a privilege of employment enjoyed by employees most comfortable in English; this, necessarily, discriminates against him on the basis of national origin because national origin influences or determines his language preference. To state the proposition in those terms is virtually to expose its lack of soundness.

No authority cited to us gives a person a right to speak any particular language while at work; unless imposed by statute, the rules of the workplace are made by collective bargaining or, in its absence, by the employer. An employer does not accord his employees a privilege of conversing in English; English spoken well or badly, is the language of our Constitution, statutes, Congress, courts and the vast majority of our nation's people. Likewise, an employer's failure to forbid employees to speak English does not grant them a privilege. An employer's refusal to hire applicants who cannot speak English might be discriminatory if the jobs they seek can be performed without knowledge of that language, but the obverse is not

correct: if the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference. Mr. Garcia was bilingual. Off the job, when he spoke one language or another, he exercised a preference. He was hired by Gloor precisely because he was bilingual, and, apart from the contested rule, his preference in language was restricted to some extent by the nature of his employment. On the job, in addressing English-speaking customers, he was obliged to use English; in serving Spanish-speaking patrons, he was required to speak Spanish. The English-only rule went a step further and restricted his preference while he was on the job and not serving a customer.

[8] Let us assume that, as contended by Mr. Garcia, there was no genuine business need for the rule and that its adoption by Gloor was arbitrary. The EEO Act does not prohibit all arbitrary employment practices. It does not forbid emloyers to hire only persons born under a certain sign of the Zodiac or persons having only long hair or

short hair or no hair at all.[3] It is directed only at specific impermissible bases of discrimination-race, color, religion, sex or national origin.[4] National origin must not be confused with ethnic or socio-cultural traits or an unrelated status, such as citizenship or alienage, Espinoza v Farah Manufacturing Co., 1973, 414 U. S. 86, 94 S. Ct. 334, 38 L.Ed.2d 287, or poverty, Ybarra v. City of Los Altos Hills, 9 Cir. 1974, 503 F.2d 250, 253, or with activities not connected with national origin, such as labor agitation, Balderas v. La Casita Farms, Inc., 5 Cir. 1974, 500 F.2d 195,198.

(9) Save for religion, the discriminations on which the Act focuses its laser of prohibition are those beyond the victim's power to alter. See Willingham v. Macon

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3 Cf. NLRB v. Knuth Brothers, Inc., 7 Cir. 1976, 537 F.2d 950, 954 (employer may discharge employee for no reason at all so long as the motivation is not violative of the National Labor Relations Act).

4 See generally Note, Developments in the Law--Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109 (1971).

Telegraph Publishing Co., 5 Cir. 1975, (en banc), 507 F.2d 1084 (employer's grooming code that required different hair lengths for males and females held not to constitute sex discrimination).[5] No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics. As this Court said in Willingham, "Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics,

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5 Courts have also found discrimination in situations in which, although the basis of discrimination was not strictly immutable, a fundamental right was involved. Willingham v. Macon Telegraph Publishing Co., 507 F.2d at 1091. See Phillips v. Martin Marietta Corp., 1971, 400 U. S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (employment discrimination against women with pre-school age children); Sprogis v. United Air Lines, Inc., 7 Cir. 1971, 444 F.2d 1194 cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (rule prohibiting female stewardesses but not male stewards from getting married found discriminatory). Cf. General Electric Co. v. Gilbert, 1976, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (exclusion of pregnancy from disability benefits plan held not to be sex discrimination).

such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related more closely to the employer's choice of how to run his business than to equality of employment opportunity." 507 F.2d at 1091 (emphasis in original).[6]

[10] The EEO Act thus does not support an interpretation that equates the language an employee prefers to use with his national origin. To a person who speaks only one tongue, language might well be an immutable characteristic like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. No claim is made that Garcia and the other employees engaged in

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6 Some taxonomies, while ostensibly based on mutable characteristics, may be merely disguised discrimination either in intent or effect. Thus, employing only persons who have a high school degree when the job can adequately be performed by persons of lesser education can be a concealed discrimination against racial groups whose numbers include fewer high school graduates. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158.

sales were unable to speak English. Indeed, it is conceded that all salesmen could do so and that this ability was an occupational qualification because of the requirement that they wait on customers who spoke only English or who used that language by their own choice.

The rule was confined to the work place and work hours. It did not apply to conversations during breaks or other employee free-time. There is neither pretension nor evidence that Gloor forbade speaking Spanish to discriminate in employment or that either the purpose or the effect of doing so was invidious to Hispanic-Americans. We do not consider rules that turn on the language used in an employee's home, the one he chooses to speak when not at work, or what was spoken by his parents or grandparents. This case concerns only a requirement that persons capable of speaking English do so while on duty.

That this rule prevents some employees, like Mr. Garcia, from exercising a preference to converse in Spanish does not convert it into discrimination based on national origin. Reduced to its simplest, the claim is "others like to speak English on the job and do so without penalty. Speaking Spanish

is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden." The argument thus reduces itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even one closely related to self-identity.

There is another foot to the statute and to the case before us, and, lest our opinion end while the parties wait for the other shoe to drop, we discuss briefly the second issue-the question of justification for the rule.

[11] The EEO Act permits discrimination in hiring and employment "where religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of that particular business or enterprise." 42 U. S. C. §2000e-2(e)(1). A BFOQ thus validates an occupational qualification that discriminates purposively. See Dotherd v. Rawlinson, 1977, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786.

The trial judge, after concluding that the Englishonly rule was not discriminatory, also held that it was justified as a BFOQ. This conclusion rests on a misunderstanding of the statute. Because the issue has been both briefed and argued, and elucidation may be helpful to the EEOC and other litigants, we discuss it briefly.

[12] The BFOQ rule allows an employer deliberately to discriminate. The English-only rule was not deliberately discriminatory; neither patently nor in secret purpose did it select national origin as a qualification for employment. Therefore the rule could not be said either to have been adopted as a BFOQ or to be legitimated by the exception.

[13] When a practice does not deliberately discriminate, it may be validated as a BFOQ. A BFOQ defense is based on business need but must be distinguished from the "business necessity" defense [BND] despite the semantic and evidentiary similarity of the BND. (Our use of acronyms is deliberate so that we will not be confused in our discussion by semantic similarity). The concepts of BFOQ and BND are related in the sense that each is founded on the functional necessities of business operation,

but the BND applies to another situation: where an employer has utilized an employment test of some other requirement not patently discriminatory and the requirement hs been demonstrated by the plaintiff to be discriminatory in effect, the employer may show in defense that the requirement is justified by business necessity. See 42 U. S. C. §2000e2(h); Grigg v. Duke Power Co., 1971, 401 U. S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. Both BFOQ and BND are defenses but a BFOQ is a warrant for affirmatve, deliberate discrimination while a BND is a defense to the prima facie case made when an apparently neutral employment practice is shown to have discriminatory effect. 7

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7 See also Board of Education v. Harris, 1979, ___U.S. ___, ___&___n.4, 100 S.Ct. __, 60 L.Ed.2d ___, 48 USLW 4035, 4041 &4042 n.4 (relation of "educational necessity" justification under Emergency School Aid Act to "business necessity" defense under Title VII). Neither BFOQ nor BND should be confused with defenses available when an employer is charged with discrimination against an individual on an impermissible basis. See Board of Trustees of Keene State College v. Sweeney, 1978, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216; Furnco Construction Corp. v. Waters, 1978, 438 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 957; McDon-

This case involves neither; because the English-only rule does not seek to discriminate on the basis of national origin (i.e. it does not single out national origin for purposes of discrimination) and has not been shown to have a discriminatory impact on Hispanic persons, it is not necessary to decide whether the rule would have been warranted by either test.

[14] Mr. Garcia and the EEOC would have us adopt a standard that the employer's business needs must be accomplished in the manner that appears to us to be the least restrictive. The statute does not give the judiciary such latitude in the absence of discrimination. If the action of an employer is based on a valid, nondiscriminatory motive, judges who have neither business experience nor the problem of meeting the employees' payroll do not have the power to preempt an employer's business judgment by imposing a solution that appears

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Ft. nt. 7 continued: nell Douglas Corp. v. Green, 1973, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668. In this case we have assumed that Mr. Garcia was fired primarily for his use of the English-only rule even though Gloor asserted legitimate, nondiscriminatory reasons for his discharge. See id.

less restrictive. See Furnco Construction Corp. v. Waters, 1978, 438 U.S. 531, 98 S.Ct. 2943, 57 L.Ed.2d 957.

IV.

[15] Having reached this point, it is unnecessary for us to consider the claims asserted under 42 U.S.C. §1981 and 42 U. S.C. §1985(c). Section 1981, which originated in the Civil Rights Act of 1866, assures "all persons" the same rights "enjoyed by white citizens" in making and enforcing contracts and in exercising other described rights. "Section 1981 is a parallel remedy against discrimination which may deprive its legal principles from Title VII." Blum v. Gulf Oil Corp., 5 Cir. 1979, 597 F.2d. 936, 938. [8]

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8 We need not, therefore, now decide whether the provision in Section 1981 that "all persons" shall have those described rights and benefits accorded "white citizens" accords protection to those who are denied these rights because they are Hispanic-Americans. See Manzanares v. Safeway Stores, Inc., 10 Cir. 1979, 593 F.2d 968. cf. Guerra v. Manchester Terminal Corp., 5th Cir. 1974, 498 F.2d 641, 653-54 (Section 1981 applies to aliens).

(16) Section 1985(c), which originated with the Civil Rights Act of 1871, gives a cause of action for damages to any person who is a victim of a conspiracy to deprive that person or a class of persons of equal protection of the laws or of equal privileges and immunities under the laws. Although the statute reaches purely private conspiracies, Griffin v. Breckenridge, 1971, 403 U. S. 88, 91 S.Ct. 1790, 29 L.Ed.2d 338, because Mr. Garcia's claim rests on a violation of Title VII, he may not invoke Section 1985 (c). Great American Federal Savings & Loan Association v. Novotny, 1979,--U.S.---, 99 S.Ct. 2345, 60 L. Ed.2d 957.[9] Cf. Johnson v. Railway Express Agency, Inc., 1975, 421 U. S. 454, 95 S.Ct. 1716, 44 L.Ed. 2d 295 (aggrieved employee not limited to Title VII but may also sue for employment discrimination under Section 1981).

V.

[17] Some of Mr. Garcia's evidence was excluded by the trial judge: the

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9 We do not reach the question whether Section 1985(c) was intended to cover only racial bias. See McLellan v. Mississippi Power & Light Co., 5 Cir. 1977, (en banc), 545 F.2d 919; Comment. A Construction of Section 1985(c) in Light of its Original Purpose, 46 U.Chi.L.Rev. 402 (1979).

investigative reports and determinations of the EEOC and the transcript of proceedings concerning Mr. Garcia's unemployment compensation claim conducted by the Texas Employment Commissioner's (TEC) Appeals Tribunal. If the exclusion of these was error, it was harmless, for, after weighing the evidence actually admitted, neither would have added appreciable weight to the contention that the rule was discriminatory. Fed.R.Evid. 103(a).

Most of the battle about the additional evidence appears to have been fought on the question of whether they were or were not business records. The admissibility of such official documents under the Federal Rules of Evidence is not determined by business records rules standards, but by Rule 803(8), which provides for the admissibility of the reports of public agencies.

(18) The district judge was, indeed, in error in refusing to admit the investigative report and determinations of the EEOC. See Peters v Jefferson Chemical Co., 5 Cir. 1975, 516 F.2d 447, 450; Smith v. Universal Services, Inc., 5 Cir. 1972, 454 F.2d 154, 157-58. That error was, as we have said, harmless. The rule would permit the introduction of the transcript of the

TEC proceedings, which was transcribed by the secretary of Mr. Garcia's lawyer, only if it were properly authenticated. Fed.R.Evid. 901. The court's rejection of the unauthenticated transcript of the TEC hearing as independent evidence was proper.

VI.

Our opinion does not, of course, impress a judicial imprimatur on all employment rules that require an employee to use or forbid him from using a language spoken by him at home or by his forbears. We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin. Even if we assume that the violation of the rule was a substantial factor leading to Mr. Garcia's discharge, we, therefore, affirm the district court's judgment that Mr. Garcia was neither discharged because of his national origin nor denied equal conditions of employment based on that factor; instead, he was discharged because, having the ability to comply with his employer's rule, he did not do so.

The judgment is AFFIRMED.

HATCHETT, Circuit Judge:

I concur in the result only.

APPENDIX D

HECTOR GARCIA, etc.
Plaintiff-Appellant,
v.
ALTON V. W. GLOOR, et al.,
Defendants-Appellees.

No. 77-2358

United States Court of Appeals,
Fifth Circuit

May 22, 1980

618 F.2d 264

Mexican-American brought employment discrimination suit challenging his former employer's rule prohibiting employees engaged in sales work from speaking Spanish on the job. The United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., rendered judgment for the employer. Mexican-American appealed. After withdrawing an earlier opinion, 609 F.2d 156, the Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) a suggested class failed to meet the requirement that the class be so numerous that

joinder of all members is impracticable, and (2) the employer's rule did not discriminate on the basis of national origin.

Affirmed.

Hatchett, Circuit Judge, concurred in the result.

Appeal from the United States District Court for the Southern District of Texas.

Before FAY, RUBIN and HATCHETT, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

IT IS ORDERED that this court's opinion reported at 609 F.2d 156 (5th Cir. 1980) be withdrawn and the following is substituted:

Invoking Title VII, the Equal Employment Opportunity Act, 42 U.S.C. §2000e-2 [EEO Act], Hector Garcia, a native-born American of Mexican descent, challenges as discriminatory his employer's rule that prohibits employees engaged in sales work from speaking Spanish on the job. Because the group of employees Mr. Garcia sought to represent was not numerous enough to constitute a class, we affirm the trial court's denial of class action certification. We conclude that the "speak-only-English" rule, as it was applied to Mr. Garcia by his employer, does not discriminate on these basis of national origin. We therefore affirm the district court's judgment that Mr. Garcia's discharge for violating the rule was not unlawful.

I.

Hector Garcia, who was twenty-four years of age at the time of trial, completed the first semester of the tenth grade in Texas public schools. He speaks both English and Spanish. His grandparents were immigrants from Mexico; he is native-born, but he has always spoken Spanish in his own household.

In 1975, he was employed as a salesman by Gloor Lumber and Supply, Inc., in Brownsville, Texas. His duties included stocking his department and keeping it in order, assisting other department salespersons and selling lumber, hardware and supplies. He had received compliments from management on his work and in May 1975 had received a bonus of $250. However, there also was evidence that Mr. Garcia was not a satisfactory employee, that management's compliments were bestowed as incentives to better performance when, on occasion, his work showed some improvement and that a bonus was awarded to all employees at year-end without regard to merit.

Gloor had a rule prohibiting employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers. Most of Gloor's employees were bilingual, but some who worked outside in the lumber yard did not speak English. The rule did not apply to

those employees. It also did not apply to conversation during work breaks.

Mr. Garcia testified that, because Spanish is his primary language, he found the English-only rule difficult to follow. He testified that on June 10, 1975 he was asked a question by another Mexican-American employee about an item requested by a customer and he responded in Spanish that the article was not available. Alton Gloor, an officer and stockholder of Gloor, overheard the conversation. Thereafter Mr. Garcia was discharged.

Mr. Gloor testified, and the district court found as a fact, that Mr. Garcia's discharge was for a combination of deficiencies--failure to keep his inventory current, failure to replenish the stock on display from stored merchandise, failure to keep his area clean and failure to respond to numerous reprimands--as well as for violation of the English-only rule. The court also found that the English-only policy was not strictly enforced but that Mr. Garcia had violated it "at every opportunity since the time of his hiring according to his own testimony."

In addition to offering this evidence to justify firing Mr. Garcia, Mr. Gloor testified that there were business reasons for the language policy: English-speaking customers objected to

communications between employees that they could not understand; pamphlets and trade literature were in English and were not available in Spanish, so it was important for employees to be fluent in English apart from conversations with English-speaking customers; if employees who normally spoke Spanish off the job were required to speak English on the job at all times and not only when waiting on English-speaking customers, they would improve their English; and the rule would permit supervisors, who did not speak Spanish, better to oversee the work of subordinates. The district court found that these were valid business reasons and that they, rather than discrimination, were the motive for the rule.

An expert witness called by the plaintiff testified that the Spanish language is the most important aspect of ethnic identification for Mexican-Americans, and it is to them what skin color is to others. Consequently, Mr. Garcia contends, with support from the Equal Employment Opportunity Commission [EEOC], that the rule violates the EEO Act and the Civil Rights Acts, 42 U S.C. §§1981 and 1985(c).

Of the eight salesmen employed by Gloor in 1975, seven were Hispanic, a matter perhaps of business necessity, because 75% of the population in its business area is of Hispanic back-

ground and many of Gloor's customers wish to be waited on by a salesman who speaks Spanish. Of its 39 employees, 31 were Hispanic, and a Hispanic sat on the Board of Directors. There is no contention that Gloor discriminated against Hispanic-Americans in any other way.

The narrow issue is whether the English-only rule as applied to Mr. Garcia imposed a discriminatory condition of employment.

II.

[1,2] Mr. Garcia properly complains that the court arrived at its denial of class certification by deciding that he had no case on the merits. The question of class certification is a procedural one, distinct from the merits of the action. Huff v. N. D. Cass Co., 5 Cir. 1973 (en banc), 485 F.2d 710; Miller v. Mackey International, Inc., 5 Cir. 1971 452 F.2d 424, 427-28. Whether a class should be certified depends entirely on whether the proposal satisfies the requirements of Fed.R.Civ.P. 23. See generally 7 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§1759-1770 (1972).

[3] However, the result reached by the trial judge was correct. A prerequisite for a class action is that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1) "The raison d'etre of

the class suit doctrine is necessity, which in turn depends upon the question of number." 3B Moore's Federal Practice ¶23.05, at 23-149 (2d ed. 1979). This depends on the fact of each case and no arbitrary rules have been established, 7 C. Wright and A. Miller, Federal Practice and Procedure: Civil, §1762 (1972), nor indeed should be. The basic question is practicability of joinder, not number of interested persons per se. Practicability of joinder depends on size of the class, ease of identifying its members and determining their addresses, facility of making service on them if joined and their geographic dispersion. See id.; 3B Moore's Federal Practice ¶23.05 (2d ed. 1979).

[4] Only thirty-one persons, those Gloor employees who were Hispanic, were affected by the English-only rule. Their identity and addresses were readily ascertainable, and they all lived in a compact geographical area. The suggested class therefore failed to meet the elementary requirement that supports the whole theory of class action--representation by one person of a group so numerous that joinder in one suit would be impracticable.

III.

Although the trial judge concluded that Mr. Garcia was fired for a number of reasons, including deliberately speaking Spanish on the

job in purposeful violations of Gloor's rule, the judge made no finding concerning the substantiality of the language violation in contributing to the matrix of motive. Perhaps under the evidence he could not, once the omelet had been cooked, determine what each egg had contributed to it.

[5] Employer action does not violate Title VII merely because a reprobated reason plays some part in the employer's decision, see Rogers v. Equal Employment Opportunity Commission, D.C. Cir. 1977, 551 F.2d 456; yet the forbidden taint need not be the sole basis for the action in order to condemn it. The record would support a finding that Mr. Garcia's use of Spanish was a significant factor and, therefore, rather than remand for a determination by the trial court, we will assume for present purposes that it was. We turn then to the issue that appers to both parties and the several amici to be at the core of the case.

The EEO Act sought to assure equality of employment opportunity by making it unlawful for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or

national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a).

[6] In interpreting the statute[1] we start with its plain words without pausing to consider whether a statute differently framed would yield results more consonant with fairness and reason. See B. Cardozo, The Nature of the Judicial Process 88-89 (1921). The first consideration is the problem, not the answer. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum.L. Rev. 527, 529-30 (1947). The statute forbids discrimination in employment on the basis of national origin. Neither the statute nor common understanding

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1 While the EEOC has considered in specific instances whether a policy prohibiting the speaking of Spanish in normal interoffice contacts discriminates on the basis of national origin. [1972] Empl.Prac. Guide (CCH) ¶6293; [1972] Empl.Prac. Guide (CCH) ¶6173, it has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them We therefore approach the problem on the basis of the statute itself and the case law.

equates national origin with the language that one chooses to speak.[2] Language may be used as a covert basis for national origin discrimination, but the English-only rule was not applied to Garcia by Gloor either to this end or with this result.

Mr. Garcia argues that it is discriminatory to prohibit employees from speaking a foreign language on the basis of a thesis that, if an employee whose most familiar language is not English is denied the right to converse in that language, he is denied a privilege of employment enjoyed by employees most comfortable in English; this, necessarily, discriminates against him on the basis of national origin because national origin influences or determines his language preference. Whether or not this argument might have a tenable basis if made on behalf of all employees who are bilingual or if invoked against a rule that forbade all use of any language but English we need not consider. Mr. Garcia was fully bilingual. He chose deliberately to speak Spanish instead of English while actually at work. He was permitted to speak the language he preferred during work breaks.

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2 The statute's legislative history concerning the meaning of "national origin" is "quite meager." See Espinoza v. Farah Mfg. Co., 1973, 414 U.S. 86, 88, 94 S.Ct. 334, 337, 38 L.Ed.2d 287, 291.

No authority cited to us gives a person a right to speak any particular language while at work; unless imposed by statute, the rules of the workplace are made by collective bargaining or, in its absence, by the employer. An employer's failure to forbid employees to speak English does not grant them a privilege. The refusal to hire applicants who cannot speak English might be discriminatory if the jobs they seek can be performed without knowledge of that language, but the obverse is not correct: if the employer engages a bilingual person, that person is granted neither right nor privilege by the statute to use the language of his personal preference. Mr. Garcia was bilingual. Off the job, when he spoke one language or another, he exercised a preference. He was hired by Gloor precisely because he was bilingual, and, apart from the contested rule, his preference in language was restricted to some extent by the nature of his employment. On the job, in addressing English-speaking customers, he was obliged to use English; in serving Spanish-speaking patrons, he was required to speak Spanish. The English-only rule went a step further and restricted his preference while he was on the job and not serving a customer.

[7] Let us assume that, as contended by Mr. Garcia, there was no genuine business need

for the rule and that its adoption by Gloor was arbitrary. The EEO Act does not prohibit all arbitrary employment practices. It does not forbid employers to hire only persons born under a certain sign of the zodiac or persons having long hair or short hair or no hair at all.[3] It is directed only at specific impermissible bases of discrimination-race, color, religion, sex, or national origin.[4] National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage, Espinoza v. Farah Manufacturing Co., 1973, 414 U. S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287, or poverty, Ybarra v. City of Los Altos Hills, 9 Cir. 1974, 503 F.2d 250, 253, or with activities not connected with national origin, such as labor agitation, Balderas v. La Casita Farms, Inc., 5 Cir. 1974, 500 F.2d 195, 198.

[8] Save for religion, the discriminations

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3 Cf. NLRB v. Knuth Brothers, Inc., 7 Cir. 1976, 537 F.2d 950, 954 (employer may discharge employee for no reason at all so long as the motivation is not violative of the National Labor Relations Act).

4 See generally Note, Developments in the Law--Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109 (1971).

on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter, see Willingham v. Macon Telegraph Publishing Co., 5 Cir. 1975. (en banc), 507 F.2d 1084 (employer's grooming code that required different hair lengths for males and females held not to constitute sex discrimination),[5] or that impose a burden on an employee on one of the prohibited bases. No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his

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5 Courts also have found discrimination in situations in which, although the basis of discrimination was not strictly immutable, a fundamental right was thought to be involved. Willingham v. Macon Telegraph Publishing Co., 507 F.2d at 1091. See Phillips v. Martin Marietta Corp., 1971, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (employment discrimination against women with pre-school age children); Sprogis v. United Air Lines, Inc. 7 Cir. 1971, 444 F.2d 1194 cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (rule prohibiting female stewardesses but not male stewards from getting married found discriminatory). Cf. General Electric Co., v. Gilbert, 1976, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (exclusion of pregnancy from disability benefits plan held not to be sex discrimination).

race, or fundamental sexual characteristics. As this court said in Willingham, "Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin. . . . But a hiring policy that distinguishes on some other ground, such as grooming codes or length of hair, is related, more closely to the employer's choice of how to run his business than to equality of employment opportunity." 507 F.2d at 1091 (emphasis in original). [6]

[9] The argument is made that the rule is discriminatory in impact, even if that result

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6 Some taxonomies, while ostensibly based on mutable characteristics, may be merely disguised discrimination either in intent or effect. Thus, employing only persons who have a high school degree when the job can adequately be performed by persons of lesser education can be concealed discrimination against racial groups whose numbers include fewer high school graduates. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. We need not here explore the extent to which the EEO Act forbids discrimination based on characteristics that are not immutable. For the purpose of this opinion, we accept the thesis that there may be a disparate impact based on some mutable conditions, such as where an employee lives. Religion is, of course, a forbidden criterion, even though a matter of individual choice.

was not intentional, because it was likely to be violated only by Hispanic-Americans and that, therefore, they have a higher risk of incurring penalties. The disparate impact test has been applied to hiring criteria, Griggs v. Duke Power Co., 1971, 401 U. S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and to on-the-job policies, Nashville Gas Co. v. Satty, 1977, 434 U. S. 136, 98 S.Ct. 347, 54 L.Ed.2d 356. It forbids the use of any employment criterion, even one neutral on its face and not intended to be discriminatory, if, in fact, the criterion causes discrimination as measured by the impact on a person or group entitled to equal opportunity. However, there is no disparate impact if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference. Mr. Garcia could readily comply with the speak-English-only rule; as to him nonobservance was a matter of choice. In similar fashion, an employer might, without business necessity, adopt a rule forbidding smoking on the job. The Act would not condemn that rule merely because it is shown that most of the employees of one race smoke, most of the employees of another do not and it is more likely that a member of the race more addicted to tobacco would be disciplined.

[10] We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification. Differences in language and other cultural attributes may not be used as a fulcrum for discrimination. However, the English-only-rule, as applied by Gloor to Mr. Garcia, did not forbid cultural expression to persons for whom compliance with it might impose hardship. While Title VII forbids the imposition of burdensome terms and conditions of employment as well as those that produce an atmosphere of racial and ethnic oppression, see Rogers v. Equal Employment Opportunity Commission, 5 Cir. 1971, 454 F.2d 234, 238-39, cert. denied, 1972, 406 U. S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343, the evidence does not support a finding that the English-only rule had this effect on Mr. Garcia.

[11] The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin. To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by

definition a matter of choice. No claim is made that Garcia and the other employees engaged in sales were unable to speak English. Indeed, it is conceded that all could do so and that this ability was an occupational qualification because of the requirement that they wait on customers who spoke only English or who used that language by choice. Nor are we confronted with a case where an employee inadvertently slipped into using a more familiar tongue.

The rule was confined to the work place and work hours. It did not apply to conversations during breaks or other employee free-time. There is no evidence that Gloor forbade speaking Spanish to discriminate in employment or that the effect of doing so was invidious to Hispanic Americans. We do not consider rules that turn on the language used in an employee's home, the one he chooses to speak when not at work or the tongue spoken by his parents or grandparents. In some circumstances, the ability to speak or the speaking of a language other than English might be equated with national orign, but this case concerns only a requirement that persons capable of speaking English do so while on duty.

That this rule prevents some employees, like Mr. Garcia, from exercising a preference to converse in Spanish does not convert it into

discrimination based on national origin. Reduced to its simplest, the claim is "others like to speak English on the job and do so without penalty. Speaking Spanish is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden." The argument thus reduces itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even one closely related to self-identity.

Mr. Garcia and the EEOC would have us adopt a standard that the employer's business needs must be accomplished in the manner that appears to us to be the least restrictive. The statute does not give the judiciary such latitude in the absence of discrimination. Judges, who have neither business experience nor the problem of meeting the employees' payroll, do not have the power to preempt an employer's business judgment by imposing a solution that appears less restrictive. See Furnco Construction Corp. v. Waters, 1978, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957.

IV.

Having reached this point, it is unnecessary for us to consider the claims asserted under 42 U.S.C. §1981 and 42 U.S.C. §1985(c). Section 1981, which originated in the Civil Rights Act of 1866, assures "all persons" the same rights "enjoyed by white citizens" in making and enforcing contracts and in exercising other described rights. "Section 1981 is a parallel remedy against discrimination which may derive its legal principles from Title VII." Blum v. Gulf Oil Corp., 5 Cir. 1979, 597 F.2d 936, 938. See Johnson v. Alexander, 8 Cir. 1978 572 F.2d 1219, 1223 and n. 3, cert. denied, 439 U. S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658. The facts here that preclude relief under Title VII also preclude a Section 1981 claim. See Blum v. Gulf Oil Corp., 5 Cir. 1979, 597 F.2d 936, 938.[7]

[12, 13] Section 1985(c), which originated with the Civil Rights Act of 1871, gives a

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7 We need not, therefore, now decide whether the provisions in Section 1981 that "all persons" shall have those described rights and benefits accorded "white citizens" protects those who are not denied these rights because they are Hispanic-Americans. See Manzanares v. Safeway Stores, Inc., 10 Cir. 1979, 593 F.2d 968; cf. Guerra v. Manchester Terminal Corp., 5 Cir. 1974, 498 F.2d 641, 653-54 (Section 1981 applies to aliens).

cause of action for damages to any person who is a victim of a conspiracy to deprive that person or a class of persons of equal protection of the laws or of equal privileges and immunities under the laws. Although the statute reaches purely private conspiracies, Griffin v. Breckenridge, 1971, 403 U. S. 88, 91 S.Ct. 1790, 19 L.Ed.2d 338, because Mr. Garcia's claim rests on a violation of Title VII he may not invoke Section 1985(c). Great American Federal Savings & Loan Association v. Novotny, 1979, 442 U. S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957.[8] Cf. Johnson v. Railway Express Agency, Inc., 1975, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (aggrieved employee not limited to Title VII but may also sue for employment discrimination under Section 1981).

V.

[14] Some of Mr. Garcia's evidence was excluded by the trial judge: the investigative reports and determinations of the EEOC and the

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8 We do not reach the question whether Section 1985(c) was intended to cover only racial bias. See McLellan v. Mississippi Power & Light Co., 5 Cir. 1977, (en banc), 545 F.2d 919; Comment, A Construction of Section 1985(c) in Light of its Original Purpose, 46 U.Chi.L.Rev. 402 (1979).

transcript of proceedings concerning Mr. Garcia's unemployment compensation claim conducted by the Texas Employment Commissioner's (TEC) Appeals Tribunal. If the exclusion of these was error, it was harmless, for, after weighing the evidence actually admitted, neither would have added appreciable weight to the contention that the rule was discriminatory. Fed.R. Evid. 102(a).

Most of the battle about the additional evidence appears to have been fought on the question of whether they were or were not business records. The admissibility of such official documents under the Federal Rules of Evidence is not determined by business records rules standards but by Rule 803(8), which provides for the admission of reports of public agencies.

[15] The district judge was, indeed, in error in refusing to admit the investigative report and determinations of the EEOC. See Peters v. Jefferson Chemical Co. 5 Cir. 1975, 516 F.2d 447, 450; Smith v. Universal Services, Inc., 5 Cir. 1972, 454 F.2d 154 157-58. That error was, as we have said, harmless. The rule would permit the introduction of the transcript of the TEC proceedings, which was transcribed by the secretary of Mr. Garcia's lawyer, only if it were properly authenticated. Fed.R.Evid.

901. The court's rejection of the unauthenticated transcript of the TEC hearing as independent evidence was proper.

[16] Our opinion does not impress a judicial imprimatur on all employment rules that require an employee to use or forbid him from using a language spoken by him at home or by his forebears. We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin as applied to a person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule. Even if we assume that the violation of the rule was a substantial factor leading to Mr. Garcia's discharge, we therefore, affirm the district court's judgment that Mr. Garcia was neither discharged because of his national origin nor denied equal conditions of employment based on that factor; instead, he was discharged because, having the ability to comply with his employer's rule, he did not do so

The judgment is AFFIRMED.

HATCHETT, Circuit Judge, concurs in the result.

APPENDIX E

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 29 CFR Part 1606, Vol. 45, No. 184, September 9, 1980 Guidelines on Discrimination Because of National Origin; Proposed Revision Agency Equal Employment Opportunity Commission Action: Proposed Revision

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SUMMARY: The Equal Employment Opportunity Commission is proposing a revision of its Guidelines on Discrimination Because of National Origin to clarify them and to specifically inform the public of unlawful employment practices which discriminate on the basis of national origin. These Guidelines reaffirm the Commission's position on national origin discrimination as expressed in Commission decisions and other legal interpretations. DATE: Comments must be received on or before November 18, 1980. ADDRESSES: Address all written comments to: Executive Secretariat, Equal Employment Opportunity Commission, 2401 E. Street, NW., Room 4096, Washington, D. C. 20506. All envelopes should be marked "National Origin Guidelines" in the lower left corner. FOR FURTHER INFORMATION CONTACT: Karen Dannart, Acting Director, or Raj K. Gupta, Supervisory Attorney, Office of Policy Implementation, 2401 E. Street, NW., Room

4002, Washington, D. C. 20506, (202) 634-7060.

SUPPLEMENTARY INFORMATION: The Equal Employment Opportunity Commission is revising its Guidelines on Discrimination Because of National Origin to clarify them and to incorporate the Commission's position on national origin discrimination as expressed in its decision and other legal interpretations. Proposed §1606.1 is based on §1606.1(b) of the current Guidelines on Discrimination Because of National Origin. It defines national origin discrimination broadly as including, but not limited to employment discrimination because of an individual's, or his or her ancestor's country of origin, or because of an individual's cultural or linguistic characteristics. The Commission will carefully examine charges involving the denial of equal employment opportunity because of an individual's name, marriage to a person of a particular national origin, or association with persons, organizations, schools or religious institutions identified with a particular national origin.

The first sentence of proposed § 1606.2 is based on §1606.1(c) of the current Guidelines, and has been revised to conform

with the coverage of Title VII It also recognizes that Title VII principles of disparate treatment and adverse impact equally apply to national origin discrimination.

Proposed §1606.3 is based on the exception in §1606.1(d) of the current Guidelines. This Section recognizes the national security exception as it appears in §703(g) of Title VII.

Proposed §1606.4 reiterates the last sentence in §1606.1(a) of the current Guidelines and is based on the Commission's long held position that the bona fide occupational qualification exception under §703(e) of Title VII shall be strictly construed.

Proposed §1606.5 is based on §1606.1 (d) and (e) of the current Guidelines. Employers may have citizenship requirements as long as they do not have the purpose of effect of discriminating against an individual on the basis of national origin. See Espinoza v. Farah Mfg. Co., Inc. 414 U. S. 86, 92 (1973). Where a State law prohibiting the employment of non-citizens is in conflict with Title VII, it is superseded under §708 of the Title.

Proposed §1606.6 is derived from several of the concepts stated in §1606.1(b) of the current Guidelines and affirms that the principles of the Uniform Guidelines on Employee Selection Procedures, 29 CFR Part 1607, apply to national origin discrimination.

Proposed §1606.6(b) specifically recognizes three selection procedures which tend to exclude individuals on the basis of national origin. Height or weight requirements, fluency-in-English requirements, and training or education requirements which deny employment opportunities to individuals because of their foreign training or education, or which require foreign training or education. Employers must evaluate these selection procedures for adverse impact.

Proposed §1606.7 recognizes that an individual's primary language is often an essential national origin characteristic. According to estimates from the Survey of Income and Education conducted by the U. S. Bureau of Census in Spring 1976, approximately 28 million persons in the United States (about 13 percent of the total U. S. population) have non-English language backgrounds and may be affected by an employer's speak-English-only rule. The survey identi-

fies persons with non-English language backgrounds as persons whose mother tongue is not English, who normally use languages other than English, or who live in households where languages other than English are spoken. About 21 million, or seventy five percent of this group are above the age of 18. The study shows the following approximate numbers for each of these language backgrounds: Spanish, 10.6 million; Italian, 2.9 million; German, Japanese, Korean and Vietnamese, 1.8 million; Polish, 1.5 million. Approximately 2.4 million persons in the United States do not speak any English at all.* Under proposed §1606.7(a), the Commission presumes that totally prohibiting employees from speaking their primary language, violates Title VII because it is a term and condition of employment which discriminates on the basis of national origin by disadvantaging an individual's employment opportunities and by creating a discriminatory working environment. Therefore, where such a rule exists, it will be closely scrutinized. However, proposed §1606.7(b) recognizes that requiring employees to speak only in English at certain times would not be discriminatory if the employer shows that the rule is

justified by business necessity. When the employer believes that the rule is justified by business necessity, proposed §1606.7(c) requires the employer to clearly inform its employees of the circumstances in which they are required to speak only in English, and the consequenses of violating the rule. Notice of the rule is necessary because it is common for individuals whose primary language is not English to inadvertently slip from speaking English to speaking their primary language. Any adverse employment decision against an individual based on a violation of the rule will be considered as evidence of discrimination when an employer has not given effective notice of the rule. The principles set forth in proposed §1606.7 do not conflict with the Fifth Circuit's decision in Garcia v. Gloor, 618 F.2d 264 (1980). Gloor did not involve a speak-English-only rule which was applied at all times. Neither did the facts in Gloor involve a bilingual employee whose primary language was not English. In the Court's view, Mr. Garcia who spoke both English and Spanish failed to prove that Spanish was his primary language.

Proposed §1606.8 states that harassment on the basis of national origin is a violaton

of Title VII and that an employer has an affirmative duty to maintain a working environment free from harassment on the basis of national origin. Proposed §1606.8(c) applies general Title VII principles to the issue of harassment and states that an employer is responsible for the acts of its supervisory employees or agents, regardless of whether the acts were authorized or forbidden by the employer and regardless of whether the employer knew or should have known of the acts. Proposed §1606.8(d) distinguishes the employer's responsibility for the acts of its agents or supervisors from the responsibility it has for conduct between fellow employees. This subsection states that liability for acts of national origin harassment in the workplace between fellow employees exists only when the employer, its agents or supervisory employees, knows or should have known of the conduct, and the employer cannot demonstrate that it took immediate and appropriate corrective action. Proposed §1606.8(e) recognizes that in certain circumstances, an employer may also be responsible for the acts of non-employees with respect to harassment of employees on the basis of national origin.

This revision of the Commission's Guidelines on Discrimination Because of National Origin is a significant regulation under Executive Order 12044, (43 FR 12661, Mar. 24, 1978, as amended by E. O. 12221, 45 FR 44249, July 1, 1980). The Commission has determined that these proposed Guidelines will not have a major impact on the economy and that a regulatory analysis is not necessary.

In compliance with Executive Order 12067 (43 FR 28967, July 5, 1978), the Commission has consulted with representatives from the necessary federal agencies. At the end of the 60 day comment period, the Commission will again consult with these agencies on the issues raised through the public comment process.

In compliances with Executive Order 12160 (44 FR 44787, Sept. 28, 1979) and with the Commission's Final Consumer Program (45 FR 38930, June 9, 1980), the Commission will notify members of the public of their opportunity to comment on these Guidelines by placing notices in periodicals likely to be read by individuals affected by the Guidelines, and also by directly mailing the Guidelines to interested groups and individuals.

Dated: September 16, 1980.

Eleanor Holmes Norton Chair, Equal Employment Opportunity Commission.

Accordingly, it is proposed to amend 29 CFR Chapter XIV by revising Part 1606 to read as follows: PART 1606--GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

Sec.

1606.1 Definition of national origin discrimination. 1606.2 Scope of title VII protection:

1606.3 The national security exception.

1606.4 The bona fide occupational qualification

exception.

1606.5 Citizenship requirements.

1606.6 Selection procedures.

1606.7 Speak-English-only rules.

1606.8 Harassment.

Authority: Title VII, Civil Rights Act of 1964, as amended; (42 U. S. C. 2000e, et seq). §1606.1 Definition of national origin discrimination.

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's country of origin; or because an individual has the cultural or

linguistic characteristics of a particular national origin. The Commission will examine with particular concern cases where individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a particular national origin; (b) membership in, or association with, an organization identified with or seeking to promote the interests of national groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a particular national origin; and (d) because an individual's name or spouse's name indicates a particular national origin.

§1606.2 Scope of title VII protection.

Title VII of the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, religion, sex or national origin. The Title VII principles of disparate treatment and diverse impact equally apply to national origin discrimination. The Guidelines apply to all persons covered by Title VII (collectively referred to as "employer" in these Guidelines).

§1606.3 The national security exception.

It is not an unlawful employment practice to deny employment opportunities to any individual who does not fulfill the national security requirements stated in Section 703(g) of Title VII.

§1606.4 The bona fide occupational qualification exception.

The exception stated in Section 703(e) of Title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed. §1606.5 Citizenship requirements.

(a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII.[1]

(b) Some State laws prohibit the employment of non-citizens. Where these laws are in conflict with Title VII, they are superseded under Section 708 of the Title.

§1606.6 Selection procedures.

(a) The Uniform Guidelines on Employee Selection Procedures, 29 CFR Part 1607,

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1 See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 92 (1973).

equally apply to discrimination on the basis of national origin.

(b) The Commission has consistently held that the following are examples of selection procedures that tend to exclude individuals on the basis of national origin. Therefore, the Commission expects a user of these selection procedures to evaluate them for adverse impact. If any of these has an adverse impact on the employment opportunities of members of a particular national origin, the user must show that the selection procedure is job related by validating it, or otherwise justifying it, under the Uniform Guidelines on Employee Selection Procedures.

(1) Height or weight requirements.[2]

(2) Fluency-in-English requirements, such as denying employment opportunities because of an individual's foreign accent,[3] or inability to communicate well in English.[4]

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2 See CD 71-1529(1971), CCH EEOC Decisions ¶6231, 3 FEP Cases 952.

3 See CD AL 68-1-55E(1969(, CCH EEOC Decisions ¶6008, 1 FEP Cases 921.

See CD YAU 9-048(1969), CCH EEOC Decisions ¶6054, 2 FEP Cases 78.

(3) Training or education requirements which deny employment opportunities to an individual because of his or her foreign training or education, or which require an individual to be foreign trained or educated.

§1606.7 Speak-English-only rules.

(a) When applied at all Times. An individual's primary language is often an essential national origin characteristic. Prohibiting employees at all times from speaking their primary language, or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment.[5] Therefore, the Commission believes that a rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) When Applied Only at Certain Times. An employer may have narrowly drawn rules requiring that employees speak only in English at certain times where the

employer can show that the rule is justified by business necessity.

(c) Notice of the Rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer must inform its employees of the exact circumstances and times when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin. § 1606.8 Harassment.

(a) The Commission has consistently held that harassment on the basis of national origin is a violation of Title VII. An employer has an affirmative duty to maintain a working environment free of harassment on the basis of national origin.[6]

(b) Ethnic slurs and other verbal or physical conduct relating to an individual's

national origin constitutes harassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

(c) An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees,

knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corective action.

(e) An employer may also be responsible for the acts of nonemployees with respect to harassment of employees in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such nonemployees.

APPENDIX F

August 20, 1980

TO ALL PARTIES LISTED BELOW:

No. 77-2358 - HECTOR GARCIA, ETC. v. ALTON V. W. GLOOR, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition () for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition () for rehearing en banc has also been denied. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk

By Sally Hayward
Deputy Clerk

cc: All Lead Counsel